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Nos. 80-847 and 80-1067

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMON CAUSE, *et al., Appellants,*

v.

HARRISON SCHMITT, *et al., Appellees.*

and

FEDERAL ELECTION COMMISSION, *Appellant,*

v.

AMERICANS FOR CHANGE, *et al., Appellees.*

On Appeal From The United States District Court For the District Of Columbia

BRIEF FOR APPELLEE FUND FOR A CONSERVATIVE MAJORITY

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QUESTION PRESENTED

Whether, in light of the holding in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), Section 9012(f) of the Presidential Election Campaign Fund Act may constitutionally limit the amount of money which political committees may spend as independent expenditures to further the election of a publicly-financed presidential candidate.

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BRIEF FOR APPELLEE FUND FOR A CONSERVATIVE MAJORITY

STATEMENT OF THE CASE

A. The Fund Act.

In 1971, Congress enacted the Presidential Election Campaign Fund Act, 26 U.S.C. §9001 *et seq.* ("Fund Act"), to provide for public financing of Presidential general election campaigns as an alternative to private fundraising by candidates. In order to be eligible to receive public funding, candidates must certify to the Federal Election Commission ("the Commission") that

they and their authorized committees[1] will abide by restrictions on contributions and expenditures which they can incur in connection with their Presidential or Vice Presidential campaigns. 26 U.S.C. §§9002(4) and 9003.

Specifically, candidates of a major political party who receive public funding under the Fund Act must pledge that neither they nor their authorized committees will incur "qualified campaign expenses"[2] in excess of the amount of public funds received, 26 U.S.C. §9003(b)(1), and that they will not accept private contributions to defray such expenses. 26 U.S.C. §9003(b)(2). In addition, expenditures by individuals and groups in coordination with the candidate's campaign are forbidden, by virtue of the statutory definition of "contribution," which includes "expenditures . . . made in cooperation, consultation or concert with" a candidate or his campaign. 2 U.S.C. §441a(a)(7)(B)(i).

A candidate who chooses to receive public funding under the Fund Act must also agree: to keep and furnish to the Commission such books, records, and other infor-

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[1] A "political committee" is defined by the Fund Act as:

> . . . any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office. 26 U.S.C. §9002(9).

A political committee is an "authorized committee" of candidates for President or Vice President if it is "authorized in writing by such candidates to incur expenses to further the election of such candidates." 26 U.S.C. §9002(1).

[2] "Qualified campaign expenses" are those campaign-related expenses incurred by the candidates, their authorized committees, or by any person authorized by the candidates or by any of their authorized committees. 26 U.S.C. §9002(11).

mation as the Commission may request pertaining to the candidate's campaign expenditures; to submit to an audit and examination by the Commission after the election; and to make such repayments of public funds as may be required by the Commission as a result of such audit. 26 U.S.C. §9003(a).

The provision of the Fund Act at issue in this appeal, 26 U.S.C. §9012(f), limits expenditures by political committees which are unaffiliated with, and completely independent of, authorized committees of a Presidential or Vice Presidential candidate. That section makes criminal the expenditure of more than $1,000 by an independent political committee "to further the election" of a Presidential or Vice Presidential candidate who has chosen to receive public funding of his campaign. Any officer or member of an independent political committee who violates section 9012(f) is subject to a fine of not more than $5,000, or one year imprisonment, or both. 26 U.S.C. §9012(f)(3).

Section 9012(f) does not apply to expenditures by broadcasters or by a periodical publication in reporting the news or in taking editorial positions, and to expenditures by a tax-exempt organization in communicating to its members the views of that organization.

B. FCM's Activities.

Ronald Reagan chose to accept public funding under the Fund Act in order to finance his 1980 Presidential general election campaign. Accordingly, Mr. Reagan and his authorized committees were barred from accepting private contributions to defray the costs of his campaign, and from spending more than the amount which he received under the Fund Act.[3]

[3] Mr. Reagan and former President Carter, who also chose to receive public funding, each received $29,440,000 under the Fund Act.

Appellee Fund For A Conservative Majority ("FCM") is a multicandidate political committee,[4] incorporated as a nonstock, not-for-profit corporation under the laws of Virginia, and is registered with the Commission pursuant to 2 U.S.C. §433. FCM originally registered in 1972 with the General Accounting Office under the name "Young Americans Campaign Committee." On October 13, 1976, FCM amended that filing to change its name to Fund For A Conservative Majority.

During calendar year 1980, FCM, through its project, "Citizens For Reagan in '80," made approximately $1.9 million in independent expenditures in support of Mr. Reagan. "Citizens For Reagan in '80" was the title of a program administered by FCM, and designed to describe its independent expenditures project in support of Mr. Reagan. All of FCM's fundraising literature made clear by express disclaimers that "Citizens For Reagan in '80" was a project of FCM, and that its activities were not paid for or authorized by any candidate.[5]

C. The Proceedings Below

The Common Cause appellants ("Common Cause") and the Commission filed suit against appellees challenging the legality of their plans, reported in the press, to conduct an independent expenditure campaign in support

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[4] A "multicandidate political committee" is defined as:

> . . . a political committee which has been registered under [2 U.S.C. §433] . . . for a period of not less than 6 months, which has received contributions from more than 50 persons, and, . . . has made contributions to 5 or more candidates for Federal office. 2 U.S.C. §441a(a)(4).

[5] *See, e.g.,* FCM fundraising literature at Common Cause Exhibits to Appendix I To Jurisdictional Statement 38b-48b.

of Mr. Reagan's candidacy for President. Both suits sought declaratory relief as to the constitutionality of Section 9012(f) and its applicability to the activities of appellees.[4]

Appellees moved for summary judgment and dismissal in both actions, arguing that Section 9012(f) was unconstitutional to the extent that it applied to their activities. On August 28, 1980, a three-judge district court issued orders dismissing both actions. As to the Commission's suit, the court granted defendants' motions for summary judgment on the merits. Count I of the Common Cause lawsuit was dismissed as moot in light of the court's disposition of the Commission's suit. Count II was dismissed for want of subject-matter jurisdiction, and for failure to state a claim upon which relief could be granted. On September 25, 1980, the court consolidated both cases and on September 30, the court issued its opinion in support of its August 28, 1980 orders disposing of both actions.

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[4] The Common Cause suit was in two counts: Count I alleged that defendants' activities on behalf of Mr. Reagan violated Section 9012(f)(1). Count II alleged that the activities of the defendants also violated other provisions of the Fund Act, and sought pretrial discovery with respect to those activities. Specifically, in Count II of its Complaint, Common Cause asserted that defendants' expenditures would be "conducted in tandem with and parallel to the official Reagan campaign." Such parallelism, it was alleged, resulted in violations on Mr. Reagan's part of his renunciation of private fundraising and excess expenditures in return for public funding of his campaign.

The Commission's suit, in a single count, alleged that appellees intended to raise and spend in excess of $1,000 to further Mr. Reagan's candidacy, and sought a declaration that such conduct would violate Section 9012(f), which the Commission also asked be declared constitutional.

D. The Opinion Of The Three-Judge Court Below

The three-judge district court struck down Section 9012(f) after a lengthy — and, we contend, correct — analysis of this Court's opinion in *Buckley* v. *Valeo*, 424 U.S.1 (1976). The lower court noted that supporters of candidates have rights separate from the candidates they favor, rights which cannot be abridged by the candidate's choice with regard to public funding. The Court held that there was no constitutional reason why the gathering of individuals into political committees should "impugn the distinct and separate rights of campaign outsiders to sponsor political speech." Commission Appendix A at 16a. Individuals, the Court held, speak through political committees, and so long as they — and the committees — are independent of the candidate, their expenditures pose no danger to the integrity of the political process. *Id.* at 21a.

Accordingly, the Court found no compelling governmental interest sufficient to justify Section 9012(f)'s undisputed restraint on First Amendment freedoms, and held that section facially unconstitutional.

SUMMARY OF ARGUMENT

Our argument can be simply stated. Comment and debate concerning public affairs, including candidates for election, constitute speech which is protected by the First Amendment. The fact that such speech depends on the expenditure of money does not alter its protection under the First Amendment. Section 9012(f) of the Fund Act, by its limitation on expenditures which might "further" the election of a candidate, restricts the quantity and scope of political speech. Such a restriction can be tolerated only if there is a compelling governmental interest in suppressing that speech. There is not a single

justification argued by appellants in support of Section 9012(f)'s burden on speech which was not considered and rejected by this Court in *Buckley* v. *Valeo, supra,* which held unconstitutional a provision of the Federal Election Campaign Act of 1971 ("FECA") which operated in the same manner — and with the same effect — as Section 9012(f) does in these cases.

Section 9012(f) is also unconstitutionally vague since it restricts and makes criminal expenditures "to further" the election of a publicly-funded Presidential or Vice Presidential candidate, without anywhere defining the words "to further," or otherwise delineating the boundary between permissible and impermissible speech. Section 9012(f), which operates in an area permeated with First Amendment interests, therefore unconstitutionally chills the right of citizens to speak out on matters concerning publicly-funded candidates.

I

SECTION 9012(f) VIOLATES THE FIRST AMENDMENT

A. Section 9012(f) Burdens Freedom Of Speech And Association, Both of Which Are Protected Under The First Amendment.

Section 9012(f) of the Fund Act makes it unlawful for any political committee which is not an authorized political committee[7] of a candidate for President or Vice President to expend more than $1,000 "to further the election" of that candidate. Section 9012(f) operates —

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[7] An "authorized committee" of a candidate is one which is authorized in writing by a candidate to incur expenses to further the election of that candidate. 26 U.S.C. §9002(1). All other political committees are, therefore, bound by the strictures of Section 9012(f).

to bar independent expenditures by "unauthorized" political committees — only if the candidate has chosen to accept public funding of his or her campaign under the Fund Act. Thus far, every major Presidential candidate since the Fund Act took effect has chosen public financing in the general election. Because the public grant under the Fund Act is so large, future Presidential candidates are likely to choose that means of financing their campaigns, thereby confronting their supporters with the severe restrictions and criminal sanctions of Section 9012(f), if those supporters try to speak out through the medium of a political committee.

By its decision in *Buckley* v. *Valeo, supra,* this Court established two fundamental principles: first, expenditures made to further the election of a candidate for public office constitute political speech protected by the First Amendment; second, where such expenditures are made independent of a candidate and his campaign, no compelling governmental interest exists sufficient to justify their regulation. Since *Buckley,* the Court has reaffirmed those principles. *Republican National Committee* v. *Federal Election Commission,* 487 F.Supp.280 (S.D.N.Y.) (three-judge court), *aff'd mem.,* 445 U.S.955 (1980).

In *Buckley,* this Court observed that contribution and expenditure limitations "operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." 424 U.S. at 14. The Court has also noted that in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth* v. *United States,* 354 U.S. 476, 484 (1957),

the First Amendment affords the broadest protection to the discussion of public issues. Similarly, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S 64, 74-75 (1964). Statutes which restrict such speech, the Court has held, are considered against the background of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

Political debate is not limited only to discussion of public issues. "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates. . . ." *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). "In a republic where the people are sovereign," this Court wrote in *Buckley*, "the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." 424 U.S. at 14-15. To the same effect, this Court has noted that "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co* v. *Roy*, 401 U.S. 265, 272 (1971).

The First Amendment protects more than just speech. It protects political association, as well as political expression. *Buckley* v. *Valeo*, 424 U.S. at 15. This is because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . ." *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958). The

First Amendment guarantees "freedom to associate with others for the common advancement of political beliefs and ideas [which] is a form of 'orderly group activity' protected by the First and Fourteenth Amendments." *Kusper* v. *Pontikes*, 414 U.S. 51, 56-57 (1973), quoting *NAACP* v. *Button*, 371 U.S. 415, 430 (1963). *See also Cousins* v. *Wigoda*, 419 U.S. 477 (1975).

A restriction on the amount which a political committee may spend on political expression "is simultaneously an interference with the freedom of its adherents." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957). For such a restriction precludes a political committee from "effectively amplifying the voice of [its] adherents, the original basis for the recognition of First Amendment protection of the freedom of association." *Buckley* v. *Valeo*, 424 U.S. at 22.

Section 9012(f) therefore directly burdens First Amendment freedoms of individuals who, independently of a candidate, wish to make themselves heard by joining together to maximize the effect of what funds they have to spend on political expression.

B. Independent Expenditures By A Candidate's Supporters Cannot Be Restricted.

In *Buckley*, this Court had before it an array of constitutional challenges to the contribution and expenditure provisions of the Federal Election Campaign Act of 1971, as amended in 1974 ("FECA"). The Court held that limitations on the amount which could be contributed to a candidate, directly or through an intermediary, entailed only a "marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 21.

The Court noted that restrictions on contributions necessarily restricted "one aspect of a contributor's right of political association, which is a 'basic constitutional freedom,' that is 'closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.' " *Id.* at 25. (citations omitted.) Nevertheless, the primary purpose of FECA — to limit the actuality and appearance of corruption resulting from large individual financial contributions — was sufficient to justify a limitation on contributions to candidates. But the Court permitted such a restriction partly because it also found that effective, alternative means of political expression were available to citizens, individually and in groups. *Id.* at 28.

The result was different when it came to expenditure limitations. Section 608(e)(1), the independent expenditure limitation before this Court in *Buckley,* restricted expenditures "relative to a clearly identified candidate" by individuals and groups. The Court flatly held that restrictions and expenditures during a campaign restricted the quantity of political speech:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech. 424 U.S. at 19.

The Court considered expenditure restrictions to be "substantial rather than merely theoretical restraints on the quantity and diversity of political speech," which would "exclude all citizens and *groups* . . . from any significant use of the most effective modes of communication."[8] *Id.* at 19-20 (emphasis added). Similarly, the Court noted that a primary effect of expenditure limitations was "to restrict the quantity of campaign speech by individuals [and] *groups*. . . ." *Id.* at 39 (emphasis added). Again and again, the Court noted the effect of FECA's expenditure limitations on groups.

The lower court in *Buckley* had held Section 608(e)(1) constitutional on the ground that it was "a loophole-closing provision only," necessary to prevent circumvention of the contribution limitations of the FECA. This Court rejected that justification, noting, in comparison to limitations on contributions, the "far greater" restraints on the freedom of speech and association imposed by expenditure limitations. Section 608(e)(1) the Court decided, would have to pass constitutional muster on its own:

> The markedly greater burden on basic freedoms caused by §608(e)(1) thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations. Rather, the constitutionality of §608(e)(1) turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression. 424 U.S. at 44-45.

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[8] The Court underscored its point by observing that "as of January 1, 1975, one full-page advertisement in a daily edition of a certain metropolitan newspaper cost $6,971.04. . . ." 424 U.S. at 20, n. 20.

In contrast to the outcome with respect to contribution limitations, the Court found that the governmental interest in preventing the appearance or reality of corruption was simply insufficient to justify the ceiling on independent expenditures contained in Section 608(e)(1). The Court explained why that was so:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, §608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse. *Id.* at 47.

After *Buckley,* then, it was settled that expenditures for the purpose of furthering the election of a candidate for elective office constituted protected political speech, and that there was no governmental interest sufficient to justify the regulation of such expenditures when they were made independent of a candidate's campaign.

C. A Limitation On Expenditures By An Independent Political Committee Restricts The Speech Of Its Members

The expenditure provision struck down in *Buckley* prevented effective and independent advocacy of a candidate by his supporters — singly and in groups. Appellants do not dispute that Section 9012(f) would likewise restrict effective and independent advocacy, but they argue that because Section 9012(f), applies only to political committees, and not to individuals, that makes all the constitutional difference between these cases and *Buckley.*

Common Cause, for instance, argues that Section 608(e)(1) was an "across-the-board restriction" on independent advocacy which barred "essentially *all* expenditures by *all* individuals, as well as by *all* groups,"[9] whereas, according to Common Cause, only certain groups are restricted by Section 9012(f). Thus, the argument goes, *Buckley* does not prevent the suppression of speech so long as its source is a political committee rather than an individual.

Buckley does prevent precisely what appellants, and Section 9012(f), are attempting to do here. This Court in *Buckley* repeatedly noted the strangling effect of Section 608(e)(1) on independent expenditures by individuals and *groups*.[10] There is no indication that the Court's decision in *Buckley* turned on 608(e)(1)'s effect solely on individuals. It could not turn on that distinction, for it makes no constitutional difference whether citizens engage in independent advocacy singly or in groups. Indeed, *Buckley* upheld restrictions on *contributions* precisely *because* alternative avenues of independent expression were available to individuals and *groups*, the Court recognizing that political advocacy could be given its strongest and most effective voice in groups, 424 U.S. at 15, and that interference with the freedom of a group

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[9] Common Cause Brief at 38, n.63 (emphasis in original). If Section 608(e)(1) barred "essentially all expenditures," then Section 9012(f), which contains exactly the same dollar limit on expenditures, must do the same.

[10] Any doubt on this point was surely dispelled by this Court in its recent description of its holding in *Buckley* striking down limitations on campaign expenditures because "they directly restrained the rights of citizens, candidates, and *associations* to engage in protected political speech." *California Medical Ass'n.* v. *Federal Election Commission*, 49 U.S.L.W. _____, (June 26, 1981) (emphasis added).

"is simultaneously an interference with the freedom of its adherents." *Id.* at 22, quoting *Sweezy* v. *New Hampshire,* 354 U.S. at 250; *see First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual.") Whether or not speech is protected and whether it can be regulated depends on the content of that speech and the reasons asserted to justify its regulation. It does not depend on the identity of the speaker.[11]

Moreover, there is no assurance that Section 9012(f) will in fact be applied only to individuals. For contrary to appellants' arguments, the apparent reach of Section 9012(f) extends to individuals and "small groups" of individuals, as well as to larger groups like FCM. The term "political committee" under the Fund Act means any "committee, association, or organization" which makes expenditures for the purpose of influencing an election. 26 U.S.C. §9002(9). The Act does not define the terms "committee," "association," or "organization." Presumably it is this omission which allows appellants the license they have taken to propound their own theories of whose expenditures are restricted by Section 9012(f) and whose are not.

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[11] We contend that FCM, as a political committee, has a right of free speech on issues of public importance, just as individuals have such a right. *See First National Bank of Boston v. Bellotti,* 435 U.S. at 788, n. 26. But we do not base our constitutional challenge to Section 9012(f) soley on the vindication of FCM's First Amendment right of speech. We simply rely on the principle announced in *Bellotti* that the source of speech does not affect its right to constitutional protection.

The Commission has not read the term "political committee" narrowly in other circumstances. The Commission proves that very point for us, for it concedes that it has held a single individual to be a political committee under FECA, notwithstanding that Act's definition of "political committee" as including only a "committee, club, association, or other group of persons. . . ." 2 U.S.C. §431(4)(A). The Commission explains its holding by noting that "the operation described . . . [did] not involve the joint purchase by several individuals (each paying their respective shares of the purchase price directly to the vendor from personal funds) of . . . a message of election advocacy." Commission Brief at 45, n. 66, quoting Advisory Opinion 1980-26, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5577, at 10,713.[12] But whether or not a group is a "political committee" under FECA does not turn on whether a purchaser of election advocacy printing or broadcast services pays the vendor directly, or through another member of a group; it depends on whether the group is one of the entities listed in the definition and whether that group received contributions or made expenditures in excess of the limitation.

The Commission has ignored the plain wording of 2 U.S.C. §431(4)(A) in deciding when a political committee exists under FECA, and has consistently read the term "political committee" in its broadest sense.[13] There

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[12] The Commission is empowered to render advisory opinions in response to a written request concerning the applicability of FECA, the Fund Act and the Presidential Primary Matching Payment Account Act (26 U.S.C. §9031, *et seq.*) 2 U.S.C. §§437d(7) and 437f.

[13] *See, e.g.*, AO 1976-51, 1 Fed. Elec. Camp. Fin. Guide (CCH), ¶ 5215; AO 1979-41, *Id.*, at ¶ 5247. The facts and the Commission's holdings in both cases are set out in FCM's Motion To Dismiss or Affirm, at 19-20.

is no reason to believe that the Commission would be any more mindful of the constitutional right of an individual or group of individuals to express themselves on the merits of a publicly-funded Presidential candidate. Indeed, there is every reason to believe the Commission would not be, for it has made clear that what distinguishes a group whose activities are controlled by Section 9012(f) from one whose activities are not, is whether "the individual participants retain control over their funds." Commission Brief at 45, n. 66. And we have seen that to meet that test, the Commission requires that each participant pay his respective share of a particular expense *directly* to the vendor. AO 1980-126, *supra*. Of such things are the constitutional right of speech and association made, in the Commission's view.

To permit Section 9012(f) to remain the law of the land will subject to possible criminal prosecution every individual who collects money from his next door neighbor to pay for a newspaper advertisement[14] which supports a publicly-funded Presidential candidate; not to mention the onerous reporting and disclosure requirements of the FECA.[15] To leave to the Commission the determination of the applicability of Section 9012(f) to the political activities of individuals and groups is to en-

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[14] It would have to be one of the better neighborhoods, given the cost of modern newspaper and broadcast advertisements. *See Buckley v. Valeo*, 424 U.S. at 20, n. 20. Because of the high cost of such services, it is likely that a large number of individuals would have to "chip in" to pay the cost. If, in the interest of convenience, one of them "passed the hat" and paid for the advertisement from the collected funds, a political committee would be born, since each member did not pay his portion of the cost directly to the vendor.

[15] The Court should not overlook the interplay between the Fund Act and FECA in this case. FECA defines a "political committee" as including "any committee, club, association or other group of

sure that there will be — for all practical purposes — no such activities, except by the wealthy. Small groups[16] of citizens of average means will not be able to afford to engage in independent expenditures on behalf of the candidate of their choice.

Appellants' arguments that groups of individuals may engage in unlimited independent expenditures, but political committees may not, is not the same argument they have made in other cases. In *Republican National Committee* v. *Federal Election Commission, supra*, the constitutionality of the Fund Act was challenged on the ground that it prevented supporters of Presidential candidates from contributing directly to the candidates' campaign. That court held that the Fund Act's restriction on such contributions did not abridge the rights of

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persons. . . ." 2 U.S.C. §431(4)(A), in contrast to the Fund Act's narrower definition of "political committee" as "any committee, association, or organization. . . ." 26 U.S.C. §9002(9). It is possible — indeed, likely, given the Commission's broad view of what constitutes a "political committee" under FECA — that a group of individuals might escape the definition under the Fund Act, and yet be caught by the wider net of FECA. Since FECA limits contributions by individuals to political committees to $5,000 per year, 2 U.S.C. §441a(a)(1)(C), a group of individuals may effectively be limited to total expenditures of $5,000 a piece, since their group activities would likely make them a political committee.

[16] "[T]wo or more individuals, pooling and using their own money, to engage jointly in personal expression . . ." is how Common Cause idealizes such groups. Common Cause Brief at 35. "Informal group[s]," the Commission called them in the Court below and in its Jurisdictional Statement to this Court, *see, e.g.*, Commission Juris. Statement at 19, until it became clear that the formal/informal dichotomy had no basis in First Amendment analysis. Both appellants should admit that the logical extension of their positions is that only wealthy individuals and small groups of such individuals are likely to be able to afford to engage in independent expenditures.

would-be contributors because uncoordinated expenditures was were permitted without limit. 487 F.Supp. at 286. That was precisely the argument advanced by the Commission in that case. There, the Commission argued that "[p]laintiffs are free to contribute money to political committees (other than the candidates' authorized committees) to make unlimited expenditures" in support of the publicly funded candidate of their choice. Brief of the Commission at 48. That is not what the Commission says now. Before this Court, the Commission has reversed itself, arguing that political committees may not engage in unlimited independent expenditures to give voice to the views of their contributors.

Similarly, Common Cause, as *amicus curiae* in *Republican National Committee*, argued that "the supporters of a candidate who has accepted public funding are free to express their support in any way they wish, except by direct or indirect contributions to the candidate himself." Common Cause admitted then as it refuses to admit now, that "under *Buckley*, there is no limit on how much an individual or *group* may spend on these activities." Common Cause Brief at 38-39 (emphasis added). Before the three-judge district court below, Common Cause attempted to explain its prior inconsistent statements on this point by contending that its argument in *Republican National Committee* espousing the right of groups to engage in independent expenditures was not intended to include political committees. Common Cause Opening Brief at 34, n. 37. Common Cause did not explain why that was so, and it is now only wishful thinking on their part. *Buckley* protects the right of individuals and groups to engage in independent expenditures. Appellants knew that in *Republican National Committee* and argued as much. They cannot now argue otherwise.

Appellants' expansive notions of the reach of Section 9012(f) — and their concomitantly narrow view of the First Amendment — would lead this Court effectively to outlaw independent political expression for all but the wealthy. And please recall that it was against the real or imagined influence of wealth that the Fund Act was intended to protect Presidential politics. Yet if appellants' view of Section 9012(f) is adopted by this Court, the wealthy will be alone in the field of independent expenditures in Presidential campaigns. Other than the voices of the candidates themselves, only the voices of those who can afford the high cost of independent advocacy will be heard. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . ." *Buckley* v. *Valeo*, 424 U.S. at 48-49; *see First National Bank of Boston* v. *Bellotti*, 435 U.S. at 791.

In *Buckley*, this Court upheld contribution limitations partly because there was, according to the Court, no indication that such limitations "would have any dramatic adverse effect on the funding of campaign and *political associations*. The overall effect of the Act's contribution ceilings [was] merely to require candidates and *political committees* to raise funds from a greater number of persons. . . ." 424 U.S. at 21-22 (emphasis added). Since *Buckley*, that is what FCM has done, with a degree of success which apparently dismays appellants.[17] Now appellants would have the Court nar-

[17] Both appellants bemoan the growth of independent expenditure groups in general. The Commission, for instance, voices the fear that "the 1984 Presidential election will be awash in expenditures by unauthorized political committees. . . ." Commission Brief at 26. Common Cause declares that five such groups (including appellees) raised $21.5 million during 1979-80, and opines that "they would

row the field of independent expenditures, ending the activities of a long-standing committee like FCM, which has given strong and apparently effective voice over the years to the views of its members on issues of importance to them. Independent expenditures must be — or they must appear to contributors to be — an effective means of self-expression, since groups like appellees have been so successful in raising funds. Moreover, if such groups were not effective, the Commission and Common Cause would not so ardently wish to have them suppressed. The very effectiveness of such groups argues against the constitutionality of efforts, like Section 9012(f), to restrict their activities, since if the avenue of effective independent expenditures through political committees is foreclosed, citizens who cannot afford such expenditures on their own will be consigned to political impotence.

We recognize that a range of individual "grass roots" and volunteer activities would still be available to individuals. But not even appellants seriously suggest that such means of expression would be as effective as the right of thousands of ordinary citizens to pool their small donations to avail themselves of "expensive modes

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raise much more than that between now and the 1984 election if Section 9012(f) is struck down. "Common Cause Brief at 33.

The success of groups like FCM in raising funds for independent expenditures in Presidential campaigns hardly argues for the constitutionality of what is practically a total ban on such expenditures. Rather, it demonstrates that citizens are willing — indeed, eager — to contribute money to independent groups to make themselves heard on issues of importance to them, even though they have no hope or expectation of "buying influence" with a candidate. Although they cannot give directly to the candidate of their choice, they want their voices to be heard — just as contributors to Common Cause want their voices heard.

of communication [which are] indispensable instruments of effective political speech." *Buckley* v. *Valeo*, 424 U.S. at 20.

In short, if appellants have their way, an important and effective means of political self-expression — through independent expenditure groups — will be foreclosed to citizens of average means; and there will be a dramatic adverse effect on the funding of political associations — a means of self-expression which this Court left intact in *Buckley*.

There is no good reason why this should be so. There is no constitutional reason why Section 9012(f) should be allowed to limit the independent speech of a political committee and its members simply because — as appellants argue — that speech is paid for by the committee, with funds collected from its members by the committee. The fact that an expenditure is involved does not make it any the less protected speech.[18]

Whether FCM and the other appellees raise funds by means of direct-mail solicitations should not be constitutionally significant. "Speech likewise is protected . . . even though it may involve a solicitation to purchase or otherwise pay or contribute money." *Virginia State Board of Pharmacy* v. *Virginia Citizens' Consumer Council*, 425 U.S. 748, 761 (1976). Direct-mail solicitation is the only practical way in which groups can raise the funds necessary to speak out effectively on behalf of

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[18] "[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *Buckley* v. *Valeo*, 424 U.S. at 16; *see Virginia State Board of Pharmacy* v. *Virginia Citizens' Consumer Council*, 425 U.S. 748 (1976). *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

their constituents. Even Common Cause solicits funds by means of mailing lists. Surely, Common Cause would concede that its actions and speech are not any less representative of the views of its donors simply because it has raised its funds through direct-mail solicitations. The same is true of FCM. Indeed, FCM and Common Cause may be alike in another way. Both have been in existence for several years and, during that time, they have built up a list of regular donors whose donations, because they are regularly made, are unquestionably spent to voice the views of those donors.

To avoid the plain holding of *Buckley* that independent expenditures could not be restricted for the reasons advanced in that case, and having advanced no new reasons themselves to justify Section 9012(f)'s restrictions, appellants argue that the donation of money to a group to pay for the members' collective speech is not an expenditure but a contribution. By doing so, appellants focus on the mechanics of the transaction, rather than on its substance. The donation of money to a group is the only effective way in which individuals can make themselves heard in the loud and crowded political arena. It is only by joining with kindred political spirits and pooling their resources that citizens can afford to use the modern — and expensive — modes of communication necessary to make their views heard. That is not a contribution; it is an expenditure by the individual, an expenditure made so that he can see and hear his viewpoint on important political issues broadcast and distributed to others.[19]

[19] Please note what is happening here. By arguing that this is a contribution case, rather than what it plainly is — an expenditure case — appellants are attempting to undo one part of *Buckley* with another. This case is no more a contribution case than *California Medical Association* v. *Federal Election Commission, supra*, which upheld a statute limiting contributions, was an expenditure case, not-

That is what appellants want to stop. They would prefer to have the American public hear only what the candidates want them to hear; to prevent groups which are uncontrolled by and unresponsive to the candidates from raising issues which the candidates might not address; and to prevent such groups from voicing the concerns of their adherents — concerns which might not be addressed in the platforms and programs of the candidates.

The Commission argues that independent speech may be suppressed because it might encourage " 'splintered parties and unrestrained factionalism [that might] do significant damage to the fabric of government.' " Commission Brief at 38, quoting *Storer* v. *Brown*, 415 U.S. 724, 736 (1974). The Commission also expresses some concern about "strong political parties" and "accountability" of those who speak for what they say in the political arena. *Id.* at 39.

FCM represents the views of its members on matters of importance to them, views which surely do not threaten the fabric of government. FCM is not a political party; it is a political committee, although its views and those of its members may offend the political parties and those who run them. The public discussion

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withstanding appellants' contrary argument. In that case, the Court was unpersuaded by appellants' argument that a restriction on contributions by an unincorporated association to a political committee was akin to an expenditure limitation, since both restrictions would restrict the ability of the association to engage in protected speech.

Just as appellants in *California Medical Association* attempted to characterize the restriction at issue there as equivalent to an expenditure limitation, appellants here have tried exactly the opposite tack and would, if successful, effectively undo a major part of the decision in *Buckley* striking down expenditure limitations on individuals and groups.

by FCM and other independent political committees may be contentious and even captious, but that is no justification for suppressing that debate. Public comment on public matters is not always genteel, as this Court has noted in *Rosenblatt* v. *Baer*, 383 U.S. 75, 85 (1966):

> The motivating force for the decision in *New York Times* [v. *Sullivan*] was twofold. We expressed "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, *and* that (such debate) may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. (emphasis in original.)

As for accountability, as a long-standing political committee, FCM is accountable to its donors for its conduct. If a committee's donors are not satisfied that their views are being accurately represented, they will not contribute to that committee and it will cease to exist. There is no higher form of accountability than that.

If an individual's payment, with others, of the cost of such collective "speech" is a contribution rather than an expenditure — and we do not for a moment concede that it is — it is still speech. As such, it can be restricted only after the "closest scrutiny" of the proferred justification for that restriction, and then only if the government "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley* v. *Valeo*, 424 U.S. at 25; *see Cousins* v. *Wigoda*, 419 U.S. at 488.

We turn now to the justifications offered by appellants in support of Section 9012(f)'s limitation on the protected speech at issue here.

D. There Is No Compelling Governmental Interest Which Justifies Section 9012(f)'s Limitation On Political Speech.

Much of the Congressional debate cited by appellants in support of Section 9012(f)'s drastic curtailment of independent advocacy deals with the high cost of modern campaigns for federal office, the need to equalize the resources available to competing candidates for President, and the need to remove from candidates the demeaning and time-consuming necessity of fundraising. This Court in *Buckley* rejected such justifications for limitations on campaign expenditures:

> The interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns. Given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support. There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate. . . .
>
> The campaign expenditure ceilings appear to be designed primarily to serve the governmental interests in reducing the allegedly skyrocketing costs of political campaigns. . . . [T]he mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people — individually as citizens and candidates and collectively

> as associations and political committees — who must retain control over the quantity and range of debate on public issues in a political campaign. 424 U.S. at 56-57.

It was also argued in *Buckley* that independent expenditures could be constitutionally limited because, like direct contributions to candidates, they are, or appear to be, corrupting to the political process. The Court rejected that argument, as well:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, §608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse. 424 U.S. at 47.

Whether or not Congress has determined that independent expenditures are to be limited because they may be corrupting,[20] this Court has decided that they may not

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[20] We do not believe that is really what Congress determined. The Congresional debate cited by appellants relates either to the Fund Act and the means of funding it, *see, e.g.*, 117 Cong. Rec. 41,780 (1971) (remarks of Sens. Cranston and Hart) or to broader substitute language for what is now Section 9012(f), 117 Cong. Rec. 42,397 (1971) (remarks of Sen. Taft), which was intended to "prevent the use of political committees as a subterfuge to avoid the expenditure limits of the Fund Act." That is not this case. FCM was not formed and did not operate simply to circumvent the limitations on expenditures by candidates. There is no allegation before this Court that FCM is anything other than an *independent* group, operating beyond the control of the candidates.

be restricted for that reason. In any event, Congress' wish is not necessarily this Court's command.

To avoid the holding of *Buckley*, both appellants argue that it is not the givers but the collectors of contributions who now pose a threat to the electoral process, by virtue of their power to amass great wealth for the purpose of attempting to influence the outcome of a Presidential election. Such wealth is made all the more sinister, according to appellants, by the fact that these "collectors" are "party and political professionals," Commission Brief at 25, and "[p]rofessional political managers." Common Cause Brief at 8.[21]

It is constitutionally insignificant how much money is collected and spent, or the political pedigree of those

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The Congressional debate on the Fund Act makes clear the Senate's dislike of fund-raising and the high cost of political campaigns. But those concerns do not justify Section 9012(f)'s strangulation of independent expenditures. The debate is not at all clear on whether Congress thought a restriction on *independent* expenditures was appropriate.

[21] Common Cause's Brief is heavily larded with the suggestion that appellees were acting in league with the Reagan campaign, by virtue of having read newspaper accounts of the Reagan campaign, because some of them (but not FCM) were managed by men who occupied positions within certain of Mr. Reagan's authorized committees, and because all appellees were run by men with professional political experience.

What is the "evil" complained of here: The expertise of the "collectors"? Their political leanings? Could a single political professional — or a "small group" of such individuals — safely make independent expenditures without running afoul of Section 9012(f)? What if they read about the Reagan campaign in the newspaper and tailored their spending strategy accordingly? Could a group of political novices conduct an independent expenditure campaign if they followed the progress of the official campaign in the press and on television?

who spend it. So long as the expenditures are made independently of the candidate and his campaign, the fact of that independence "not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley* v. *Valeo*, 424 U.S. at 47.

In fact, it would seem more objectionable if a wealthy individual, or a "small group" of such individuals spent a large sum of money in independent expenditures. Surely their motives would be more suspect than those of the many givers of small amounts or the managers of political committees like FCM who raise and spend such amounts.

FCM, or its predecessor, has been in operation since 1972. Its managers, those who work to raise and spend money on behalf of issues and candidates, do so because they believe in what they are doing, not because they expect to gain special favors with the White House. Moreover, people do not give money to help candidates whom they do not already support. If FCM has been successful in raising money to spend on behalf of Mr. Reagan, it is because FCM's donors wanted to support Mr. Reagan in the most effective way available to them. That does not make Mr. Reagan "beholden" to FCM. Rather, his popularity made it possible for FCM to raise funds. Just as "the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support . . ." *Buckley* v. *Valeo*, 424 U.S. at 56, so also will the desire of individuals to engage in independent expenditures and the ability of groups like FCM to raise funds to express the views of its members.

The court below in this case said it best:

> Politics is, after all, the unifying theme among members of political committees; their associational tie is the desire to affirm publicly their political viewpoint held in common. *The organizers of political commitees really only mobilize existing political sentiment looking for an outlet — the small size of contributions freely given by diverse contributors expecting no personal glory or prospects of hobnobbing with celebrities attests to that.* Commission Appendix To Juris. Statement A at 26a-27a. (emphasis added).

Thus, the ability of FCM and groups like it to influence the electoral process is not disproportionate to their public support; rather, it is a product of the willingness of thousands of ordinary citizens who have pooled their resources to make themselves heard.

Independent expenditures do not subvert the purpose of the Fund Act. They are a prerequisite to political speech engaged in by those unconnected with the candidate or his campaign. If they are not independent, those expenditures would violate both the Fund Act and FECA, for such expenditures would be deemed to be contributions to the candidate, as well as excess qualified campaign expenses incurred by that candidate, 2 U.S.C. §441a(a)(7)(B)(i), subjecting both the candidate and his authorized committees to civil and criminal sanctions. 26 U.S.C. §§9007, 9012(a); 2 U.S.C. §437g. Thus, while unnecessary to prevent circumvention of the contribution and expenditure limitations of the Fund Act, Section 9012(f) also severely — and unconstitutionally — restricts independent advocacy, despite its substantially diminished potential for abuse.[22] *Buckley* v. *Valeo,* 424 U.S. at 47.

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[22] The irony of appellants' position is that, if it is adopted by this Court, individuals and political committees will be free to spend without limit on Congressional and Senate elections, but they will not be similarly free to speak out as to candidates for the highest office in the land.

1. Section 9012(f) is underinclusive

Unlike the Fund Act's outright ban on direct or indirect contributions to candidates for President or Vice President who receive federal funding for their campaigns, Section 9012(f) purports to limit the independent expenditures of only "political committees." On its face, Section 9012(f) does not apply to a "broadcaster," "periodical publication," or to certain expenditures of a "501(c)" organization. 26 U.S.C. §9012(f)(2)(A) and (B). There is no compelling interest which warrants depriving FCM and its members of the right to make expenditures, but, which allows the media and organizations registered under Section 501(c) of the Internal Revenue Code to make unlimited expenditures. By exempting potentially massive expenditures by such organizations, the reach of Section 9012(f) is woefully underinclusive and fails to eliminate the danger of corruption and the appearance of corruption. Absolutely no essential difference exists between large expenditures exempted under Section 9012(f)(2) and the expenditures prohibited under Section 9012(f)(1). Each type of expenditure has the same innate character, and thus each poses the same danger as a *quid pro quo* for obtaining improper influence over candidates for elective office (assuming, *arguendo,* that any independent expenditure poses such a danger).

Yet for no discernible reason, one group's expenditures are permitted, while another's are forbidden. The distinction cannot be based on the differences between the constitutional guarantees of a free press and of free speech, for "the press does not have a monopoly on either the First Amendment or the ability to enlighten." *First National Bank of Boston* v. *Bellotti,* 435 U.S. at 782.

Finally, were the Court to adopt the distinction propounded by appellants that would allow unlimited independent expenditures by only individuals and "small groups," and add to that number the many entities exempted under Section 9012(f)(2), the prohibition of Section 9012(f)(1) would become the exception rather than the rule, and would be underinclusive in the extreme. In essence, such a distinction would mean that thousands of groups and the media could expend unlimited amounts independent of a Presidential candidate's campaign, but not FCM and others similarly situated, who speak for their many members. The reach of Section 9012(f) is thus underinclusive and fails to effectuate in any substantial degree the asserted purpose of preventing corruption or the appearance of corruption.

Appellants have offered no principled basis on which to explain who may and who may not engage in independent advocacy under Section 9012(f). They have offered no argument in support of the constitutionality of Section 9012(f) which was not considered and rejected by this Court in *Buckley* in striking down a provision of FECA which would have operated on appellants in this case exactly as Section 9012(f) operates.

Whether reasonable or unreasonable, supportive of one candidate or critical of another, constructive or querulous, the right to engage in independent political debate cannot be abridged for any of the reasons advanced by appellants.

E. Section 9012(f) Is Unconstitutionally Vague

Section 9012(f) forbids expenditures in excess of $1,000 which meet the definition of a "qualified campaign expense" if those expenditures "further" the election of a candidate. A "qualified campaign expense" is

defined as one which is incurred by the candidate or his authorized committees "to further" his election or the election of his running mate. 26 U.S.C. §9002(11). Nowhere are the words "to further" defined.

Almost any act of political self-expression can "further" a candidate's election. A statement against one candidate furthers the election of his opponent. Statements on issues — pro or con — affect elections, and can "further" the election of a candidate. "[T]he distinction between discussion of issues and candidates and advocacy of election may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley* v. *Valeo*, 424 U.S. at 42. Thus, for instance, an advertising program, or even a fund-raising drive, critical of the Panama Canal Treaty, which was supported by Mr. Carter and opposed by Mr. Reagan, could be considered to "further" the election of Mr. Reagan. Section 9012(f) therefore affects not only pro- or anti-candidate groups, but issue groups, as well. And the fact that it applies only to "political committees" does not save it from constitutional infirmity, for, as we have shown, the definition of a "political committee," and hence the applicability of Section 9012(f), is far from certain.

Where, as here, a statute imposes criminal sanctions in an area permeated with First Amendment interests, close scrutiny of the particularity of the statute is required, *Buckley* v. *Valeo,* 424 U.S. at 40-41; *see Smith* v. *Goguen,* 415 U.S. 566, 573 (1974). Narrow specificity is required because vague laws operate to chill expression by "inducing citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Buckley* v. *Valeo,* 424 U.S. at 41,

n.48 (cases quoted omitted). The accepted test is "whether the language [of the statute] affords the 'precision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.' " *Buckley* v. *Valeo,* 424 U.S. at 41, quoting *NAACP* v. *Button,* 371 U.S. at 438.

In *Buckley,* this Court turned back a challenge to the vagueness of Section 608(e)(1)'s prohibition on expenditures "relative to" a candidate, by finding elsewhere in that provision narrowing language which restricted the broad scope of Section 608(e)(1). There is no such language in Section 9012(f) which limits the broad sweep of its restrictions on independent expenditures which "further" the election of a candidate. The expenditures which are limited by that section are those which would constitute "qualified campaign expenses," which are themselves defined as expenses which "further" the election of a candidate. 26 U.S.C. §9002(11). Thus, even the gloss given Section 9012(f) by other provisions of the Fund Act does not narrow its sweep to avoid restrictions on all manner of undefined speech which *might* "further" the election of a candidate.

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Buckley* v. *Valeo,* 424 U.S. at 41, n.48, quoting *NAACP* v. *Button,* 371 U.S. at 433. Section 9012(f) crowds First Amendment freedoms without informing those who may wish to exercise those freedoms just how far they may go. Accordingly, it is unconstitutionally vague and should be struck down as such by this Court.

CONCLUSION

For the foregoing reasons, this Court should uphold the decision of the court below and declare Section 9012(f) unconstitutional on its face.

Respectfully submitted,

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